



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF J-C-& CO.

DATE: JULY 5, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of financial services, seeks to employ the Beneficiary as a software engineer. It requests his classification under the second-preference immigrant category as a member of the professions holding an advanced degree. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, “EB-2” category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least a master’s degree, or a bachelor’s degree followed by five years of experience.

The Director of the Nebraska Service Center denied the petition. The Director concluded that, contrary to the Act and regulations, the accompanying certification from the U.S. Department of Labor (DOL) did not remain valid for the job opportunity. Specifically, the Director found that the Petitioner did not establish itself as a successor in interest of the employer that filed the certification application.

On appeal, the Petitioner asserts that the Director erred in finding its acquisition of the labor certification employer through a reverse triangular merger insufficient to establish successorship. The Petitioner contends that the Director disregarded evidence of its ownership of the employer and required excessive proof of the merger’s details. The Petitioner also maintains that the post-merger timing of the filing of the certification application did not bar successorship because the companies’ ownership transfer was “an ongoing process” that continued during the application’s pendency.

Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain DOL certification. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves an offered position, an employer must next submit the labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a beneficiary meets requirements of an offered position and a requested visa classification. If USCIS grants a petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. THE VALIDITY OF THE LABOR CERTIFICATION

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, a petition for an advanced degree professional must include a valid, individual labor certification. 8 C.F.R. § 204.5(k)(4)(i). A labor certification remains valid "only for the particular job opportunity" stated on it. 20 C.F.R. § 656.30(c)(2).

A petitioner may use a labor certification listing another employer only if the petitioner establishes itself as a successor in interest of the listed employer. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482 (Comm'r 1986). For immigration purposes, a successor must: fully describe and document the transaction(s) by which it acquired a predecessor; demonstrate that, except for the change of employer, the job opportunity remains the same as listed on the labor certification; and establish its eligibility as a petitioner, including the abilities of it and the predecessor to continuously pay the position's proffered wage from the petition's priority date onward. *Id.* at 482-83.¹

USCIS defines the term "successor in interest" as "[o]ne who follows another in the ownership or control of property. . . . A successor in interest retains the same rights as the original owner, with no change in substance." Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Ops., USCIS HQ 70/6.2, *Successor-in-Interest Determinations in Adjudication of Form I-140 Petitions; Adjudicators Field Manual (AFM) Update to Chapter 22.2(b)(5)(AD09-37)* 3 (Aug. 6, 2009) (quoting *Black's Law Dictionary*, 1473 (8th Ed. 2004)). The Agency similarly defines the term "successor" as "a corporation that, through amalgamation, consolidation, or other assumption of interests, is vested with the rights and duties of an earlier corporation." *Id.* To establish a successorship,

[t]he evidence provided must show that the successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor.

Id. at 8.

Here, as previously indicated, the record shows that the Petitioner acquired the labor certification employer, an online payment service provider, in a reverse triangular merger. It created a subsidiary corporation that merged with the labor certification employer. The subsidiary then immediately

¹ This petition's priority date is January 8, 2018, the date DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

dissolved, leaving the labor certification employer as the surviving entity and the Petitioner's subsidiary. Following this acquisition of the labor certification employer by the Petitioner, the Petitioner may use the labor certification obtained by the labor certification employer only if it establishes itself as the labor certification employer's successor in interest. *See Matter of Dial Auto*, 19 I&N Dec. at 482.

A. The Nature of the Merger

The Director rejected the Petitioner's successorship claim in part because the company did not demonstrate its assumption of "rights and duties" of the labor certification employer. "Rather," the Director stated, "the labor certification employer . . . appears to have survived the merger intact, continuing its prior business activities with the same rights and obligations it had before the transaction."

The record supports the Director's decision. Contrary to USCIS policy, the Petitioner has not established that it "acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor." *See* Neufeld Memo, at 8. The Petitioner did not submit documentation that it acquired, for example, a deed or lease to the property of the intended worksite, rights to the employer's software products, or its customer contracts. Rather, the record indicates that the employer survived the merger (becoming the Petitioner's subsidiary) with the same assets and liabilities it held before the transaction. A company press release issued after the merger states that the labor certification employer will "leverag[e]" the Petitioner's "broader capabilities," but "will continue as a standalone entity." The record also indicates that the labor certification employer uses the same name and federal employer identification number as it did before the acquisition. In addition, the Petitioner submitted copies of payroll records from November 2017 through October 2018, indicating the labor certification employer's continued employment and payment of the Beneficiary's wages since before the December 2017 merger. Thus, the Petitioner has not established its assumption of rights and obligations needed to run the business of the labor certification employer.

On appeal, the Petitioner argues that the Director misread a federal court decision and thus incorrectly concluded that a reverse triangular merger did not transfer rights or obligations from a target company to an acquiring company. The Petitioner notes that the court held only that a reverse triangular merger does not render an acquiring company liable for alleged torts that a targeted company committed before the merger. *See Morgan v. Powe, Timber Co.*, 367 F. Supp. 2d 1032, 1035-40 (S.D. Miss. 2005).

Setting aside that particular federal court decision, other applicable case law nevertheless indicates that the Petitioner's reverse triangular merger did not by itself effectuate any transfer of rights or obligations of the labor certification employer. The labor certification lists the proposed worksite of the offered position as California. But copies of corporate certificates of record indicate that Delaware law governed the merger. The Petitioner has not provided any evidence establishing that any other law applies or, in any event, that a reverse triangular merger would result in the transfer of the essential rights and obligations of the surviving entity of a reverse triangular merger to the new parent company. In the context of a contractual anti-assignment provision, the Delaware Court of

Chancery has held that, unless a transaction agreement included a contrary provision, a reverse triangular merger under Delaware law does not result in assignment of a targeted corporation's assets. *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 62 A.3d 62, 88 (Del.Ch. 2013).² The court found that "[t]he vast majority of commentary discussing reverse triangular mergers" agrees that "the rights and obligations of the target are not transferred, assumed or affected." *Id.* at 83 (quoting *Lewis v. Ward*, No. Civ.A 15255, 2003 WL 22461894 *4 n.18 (Del.Ch. Oct. 29, 2003)).³ The Petitioner has not demonstrated that any other law applies, that a reverse triangular merger by itself would effectuate the transfer of rights or obligations of the surviving entity to the new parent company (beyond merely triggering consent rights under an anti-assignment provision), or that the merger agreement of the labor certification employer and the Petitioner's former subsidiary in this specific case contained a provision granting the Petitioner any of the assets and liabilities (i.e. the rights and obligations) of the labor certification employer. Case law therefore supports the Director's conclusion that the Petitioner did not assume essential rights and obligations of the labor certification employer in the reverse triangular merger and the Petitioner has made no demonstration to the contrary.

The Petitioner also argues that the Director disregarded the corporate certificates it submitted, which it contends establish it as the successor of the labor certification employer. We agree that the certificates demonstrate that the Petitioner gained ownership of the labor certification employer. However, the Petitioner has not established that it "acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor." *See* Neufeld Memo, at 8. Rather, the record indicates that the Petitioner acquired the labor certification employer as a subsidiary and, in the words of the company press release, "as a standalone entity." *See also Wells Fargo & Co. v. First Interstate Bancorp.*, Civ.A.Nos. 14696, 14623, 1996 WL 32169, *7 (Del.Ch. Jan. 18, 1996) (finding it "possible that the only practical effect of the [reverse triangular] merger is the conversion of the property interest of the shareholders of the target corporation").

The Petitioner further contends that the Director held it to a higher standard than other successorship claimants. The Petitioner argues that, contrary to USCIS policy, the Director required it to demonstrate its acquisition of "all" assets and liabilities of the labor certification employer.⁴ The

² The Delaware Court of Chancery, a non-jury trial court, does not issue precedential decisions. But the court "is widely recognized as the nation's leading authority on corporate law issues." *Simmonds v. Credit Suisse Secs. (USA) LLC*, 638 F.3d 1072, 1089 (9th Cir. 2011), *vacated on other grounds*, 566 U.S. 221 (2012), *remanded to* 678 F.3d 1139 (9th Cir. 2012) (citing William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 Bus. Law 351 (1992)).

³ *But see SQL Solutions, Inc. v. Oracle Corp.*, No. C-91-1079 MHP, 1991 WL 626458 *3 (N.D. Cal. Dec. 18, 1991) (finding that California courts have consistently recognized under California law that a legal change in a business's ownership results in an assignment or transfer of its rights). However, the Delaware Court of Chancery in *Meso Scale Diagnostics* expressly rejected the approach discussed in *SQL Solutions*, noting that the federal district court in *SQL Solutions* "provide[d] no further explanation for its apparent holding that any change in ownership, including a reverse triangular merger, is an assignment by operation of law." 62 A.3d at 88.

⁴ The Petitioner's claim is not supported by the record. The Director's decision specifically stated that the Petitioner must document "the transfer of rights, obligations, and ownership of the predecessor *necessary to carry on the business of the predecessor*." (emphasis added). The Director did not require that the Petitioner assume *all* of the assets and liabilities.

Petitioner contends that, despite recognizing it as “the parent company of the labor certification employer,” the Director improperly required it to submit additional evidence of the acquisition’s details. The Petitioner asserts: “This information is not necessary to meet the standard of a successor-in-interest relationship [as] outlined by the Service and regulations.”

The Petitioner correctly states that a successor need not demonstrate its acquisition of all of a predecessor’s assets and liabilities. A successor’s acquisition may exclude liabilities “unrelated to the original job opportunity,” such as “pending or potential sexual harassment litigation, or other tort obligations.” Neufeld Memo, at 8. As previously indicated, however, a petitioner must establish its assumption of “the *essential* rights and obligations of the predecessor.” *Id.* (emphasis added). Here, as previously discussed, the Petitioner has not demonstrated its acquisition of essential rights and obligations related to the offered position of software engineer. As noted above, the record demonstrates that the Petitioner acquired the labor certification employer as a subsidiary, with all the essential rights and obligations of the labor certification employer related to the offered position remaining with the labor certification employer as the surviving entity following the reverse triangular merger. It is the Petitioner’s burden to demonstrate eligibility, but the Petitioner has not done so here. The record therefore does not establish that the Director held the Petitioner to a higher standard.

For the foregoing reasons, the Petitioner has not demonstrated that it is the successor in interest to the labor certification employer through its acquisition of the essential rights and obligations needed to operate the business of the labor certification employer since such rights and obligations remain with the labor certification employer. We will therefore affirm the Director’s decision that the Petitioner did not establish itself as the employer’s successor.

B. The Timing of the Merger

The Director also found that USCIS policy bars the Petitioner’s successorship claim because its acquisition of the labor certification employer predated the filing of the certification application. The Director cited a USCIS policy memo stating that:

USCIS will make successor-in-interest (SII) determinations in Form I-140 petitions supported by an approved labor certification if the transfer of ownership took place *anytime while such application was still pending or after the labor certification was approved by [DOL]*.

USCIS Policy Memorandum PM-602-0005.1, *Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator’s Field Manual (AFM) Chapter 22.2, AFM Update AD11-14* 1 (Dec. 22, 2010), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/i-140-evidence-pm-6002-005-1.pdf> (last visited May 7, 2019) (emphasis added).

Here, the record indicates the Petitioner’s acquisition of the labor certification employer occurred on December 1, 2017. As previously noted, the employer filed the certification application on January 8, 2018. Because the labor certification employer filed the application after it was acquired by the

Petitioner, the Director correctly found that USCIS policy precludes the Petitioner's successorship claim.

The Petitioner argues that the Director erred in interpreting a "transfer of ownership" as a single point in time. Rather, the Petitioner asserts that its acquisition:

is an ongoing process in which assets, records, employee benefits, and payroll must all be transferred. While the legal merger occurred in December 2017, the transfer of assets and merging of corporations continued through the time of filing the labor certification related to the instant case.

The Petitioner asserts that, because the ownership transfer continued during the pendency of the labor certification application, USCIS policy does not bar the company's claimed successorship. Contrary to the Petitioner's argument, however, the record does not support the company's acquisition of assets from the labor certification employer, or the transfer of the employer's workers to the Petitioner's payroll. A letter from an official of the Petitioner's legal department states that, as part of the merger, "employees of [the labor certification employer] became employees of [the Petitioner]." But, as previously indicated, payroll records indicate that the Beneficiary remained on the employer's payroll after the merger. Also, a corporate certificate dated December 1, 2017, states that "[t]he Merger is to become effective immediately, without any further action, upon the filing of this Certificate of Merger." The record therefore does not support the Petitioner's argument that, as of the filing of the labor certification application, the ownership transfer was "ongoing."

The Petitioner further argues that the labor certification employer complied with DOL policy in the filing of the labor certification application. DOL policy requires the U.S. employer to advertise an offered position in its legal name at the time of recruitment and to file a labor certification application in its legal name at the time of submission. DOL, "OFLC [Office of Foreign Labor Certification] Frequently Asked Questions and Answers," Advertisement Content, 10, <https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm> (last visited May 8, 2019). DOL policy further states:

If a merger, acquisition, or any other corporate change in ownership occurs between the time of recruitment and the time of submission, resulting in a disparity between the employer's name shown on the advertising used to recruit for a job opportunity and the employer's name on the submitted [labor certification application], the employer must be prepared to provide documentation - in the event of an audit - proving that it is the successor in interest.

The Petitioner asserts that "no disparity existed between the employing entity listed in the recruitment and the employing entity at the time of filing the Form 9089" and that the labor certification employer's filing of the application in its name after the merger does not prohibit us from finding that a successor relationship exists.

However, as noted above, USCIS policy provides that successor-in-interest determinations may be made only where the transfer of ownership takes place after the filing of the labor certification. The

Petitioner has not demonstrated that, at any point after the filing of the labor certification, there was a transaction that transferred ownership of the essential rights and obligations of the labor certification employer's business from the labor certification employer to the Petitioner. Even if the record corroborated the claim that the merger was ongoing, which it does not, it is the Petitioner's burden to show when and how the Petitioner assumed the essential rights and obligations of the labor certification employer necessary to carry on the labor certification employer's business such that a successorship was created. Here, as discussed above, the Petitioner has not met that burden.

III. CONCLUSION

The record does not demonstrate the Petitioner's assumption of essential rights and obligations of the labor certification employer and indicates that the Petitioner's acquisition of the employer predated the filing of the certification application. The Petitioner therefore has not established its claimed successor-in-interest relationship to the employer and thus the validity of the accompanying labor certification. We will affirm the Director's decision for the foregoing reasons, with each considered an independent and alternate ground of denial. Contrary to section 291 of the Act, 8 U.S.C. § 1361, the Petitioner did not meet its burden of establishing eligibility for the requested benefit.

ORDER: The appeal is dismissed.

Cite as *Matter of J-C-&Co.*, ID# 4387427 (AAO July 5, 2019)